Supreme Court, U.S.
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No. 98-906

In The

Supreme Court of the United States

October Term, 1998

STATE OF GEORGIA, DEPARTMENT OF REVENUE,

Petitioner,

v.

GARY BURKE and PAMELA B. BURKE and
RAYMOND D. HEADRICK and
CYNTHIA J. HEADRICK

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

DAVID J. BEDERMAN
Counsel of Record
Gambrell Hall
Atlanta, Georgia 30322-2770
Phone (404) 727-6822
Counsel for all Respondents

SCOTT J. KLOSINSKI, P.C.
6 George C. Wilson Court
Augusta, Georgia 30909
Counsel for Headricks

ANGELA CARTER MCELROY
MCELROY & TOOLE
410 Telfair Street
Augusta, Georgia 30901
Counsel for Burkes

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I

In unambiguously abrogating, in 11 U.S.C. § 106(a), States' Eleventh Amendment immunity in bankruptcy proceedings, did Congress validly legislate pursuant to the Fourteenth Amendment?

II

By filing a proof of claim against the debtors' estate, did Georgia waive its Eleventh Amendment immunity from proceedings to enforce the bankruptcy court's automatic stay and discharge injunction orders relevant to those claims?

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

In its indication of Opinions Below, Pet. 1, Petitioner failed to indicate that the United States Bankruptcy Court for the Southern District of Georgia issued two sets of opinions in both *In re Burke*, 200 B.R. 282 (Bankr. S.D. Ga. 1996), motion to amend denied by, 203 B.R. 493 (Bankr. S.D. Ga. 1996); and *In re Headrick*, 200 B.R. 963 (Bankr. S.D. Ga. 1996), motion to amend denied by, 203 B.R. 805 (Bankr. S.D. Ga. 1996).

STATEMENT

1. Petitioner's statement fails to fully and precisely indicate the facts giving rise to the bankruptcy proceedings herein and the posture of the cases on review. This is a consolidated appeal of two bankruptcy proceedings: *Burke* and *Headrick*. For the purposes of the abrogation issue decided by the District Court (but not reached by the Court of Appeals), the only difference between the two cases is that *Burke* is a section 524(a) proceeding in which Georgia is alleged to have violated the discharge injunction granted to the Debtors, while *Headrick* is a § 362 proceeding for violation of the automatic stay. There are no other material facts that distinguish the cases.

On the issue of whether Georgia had waived its immunity by filing proofs of claim, the question decided by the Court of Appeals, the two cases are in a slightly different procedural posture, to wit:

a. *Headrick*. The essential fact which gave rise to the Bankruptcy Court's holding that Georgia had waived its Eleventh Amendment immunity in *Headrick* was that the State filed a proof of claim against the Headricks' bankruptcy estate on April 10, 1995. 200 B.R. at 965; 203 B.R. at 807. Furthermore, on October 24, 1995, Georgia issued a document titled "Official Assessment and Demand for Payment" against the Debtors, followed by a December 21, 1995, "Collection Notice" which contained demands for payment and threats of collection by levy, garnishment or attachment. 200 B.R. at 965; 203 B.R. at 807. It was at this juncture that the Headricks instituted an adversary action against Georgia for violation of the stay imposed under section 362 of the Bankruptcy Code. 200 B.R. at 965; 203 B.R. at 807.

b. *Burke*. Georgia filed a proof of claim against the Burkes' bankruptcy estate on December 1, 1992. 200 B.R. at 284; 203 B.R. at 494. The State subsequently participated in the adjudication of the bankruptcy estate. But, apparently unhappy with the priority of claims made by the Bankruptcy Court in the discharge injunction, Georgia sought nevertheless to collect on the tax debt that had been the subject of its proof of claim. So on May 3, 1994, the State issued a letter to the Debtors which contained demands for payment and threats of collection by levy, garnishment or attachment. 200 B.R. at 284; 203 B.R. at 494. The Burkes then reopened their Chapter 7 proceeding and a contempt motion was made against Georgia for violation of the discharge injunction imposed under section 524(a) of the Bankruptcy Code. 200 B.R. at 284; 203 B.R. at 494.

2. In both cases, the Bankruptcy Court ruled that Georgia had waived its Eleventh Amendment immunity for these proceedings *only*. *Headrick*, 200 B.R. at 967-69; 203

B.R. at 809-10; *Burke*, 200 B.R. at 288; 203 B.R. at 497-98. The Bankruptcy Court then found that, in *Burke*, Georgia had violated the discharge injunction of § 524 by making post-discharge collection efforts on discharged debts. *Burke*, 200 B.R. at 288. The Bankruptcy Court did not, however, rule on the merits of Headricks' section 362 action, holding that further factual questions remained as to whether Georgia's collection efforts violated the stay or injunction. *Headrick*, 200 B.R. at 970; 203 B.R. at 809.

The District Court, in an unpublished opinion, Pet. App. 17, ruled that Congress had manifestly abrogated the States' Eleventh Amendment immunity in legislating 11 U.S.C. § 106(a), and that such an abrogation was a proper exercise of Congress' power under the Privileges or Immunities and Due Process Clauses of the Fourteenth Amendment. Pet. App. 22-24.

The U.S. Court of Appeals for the Eleventh Circuit affirmed, but on the waiver ground ruled on by the Bankruptcy Court (but not the District Court). The Eleventh Circuit consequently chose not to address the abrogation issue raised under section 106(a) of the Bankruptcy Code. Pet. App. 8-9. The Court of Appeals also chose to premise its waiver ruling on the common law of State sovereign immunity in bankruptcy, and not the codification of that immunity in 11 U.S.C. § 106(b). Pet. App. 9-10 n.8.

The Court of Appeals went on to hold, that, by filing a proof of claim against both the Headrick and Burke estates, Georgia had waived any immunity in any subsequent proceedings to enforce the Bankruptcy Court's automatic stay and discharge injunction orders. Pet. App. 14. The Eleventh Circuit ruled that "the enforcement of the bankruptcy court's orders in both the instant cases falls easily within the waiver of immunity 'respecting the adjudication of the claim' found

by" this Court in previous decisions. Pet. App. 15 (quoting *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947)). The Eleventh Circuit also took care to limit its decision that Georgia had only waived any immunity as to the debtors' recovery of costs and attorneys' fees incurred in enforcing the Bankruptcy Court's automatic stay and discharge injunction. Pet. App. 15-16.

After a Petition for Rehearing was denied by the Eleventh Circuit, Pet. App. 49-50, this timely Petition for Certiorari followed.

REASONS FOR DENYING THE WRIT

1. In order to justify this Court's plenary review of the case, Petitioner vastly expands the holding below. The Eleventh Circuit most certainly did *not* rule that when a bankruptcy court exercises jurisdiction over a State which files a proof of claim that it also has jurisdiction over *all* adversary proceedings filed by the debtors against the State. See Pet. 7. Rather, the Eleventh Circuit's holding was exceedingly narrow as to both the nature of the bankruptcy proceeding that a State's waiver will be deemed to apply, as well as the kind of relief that may be sought from the State in that connection.

The court of appeals conditioned its waiver ruling for those situations (as here) where a State actively participates in a bankruptcy proceeding, is unsatisfied with the outcome, proceeds to defy the automatic stay or discharge injunction, and the debtor is consequently compelled to enforce the bankruptcy court's order. See Pet. App. 14. Moreover, the court below narrowed the relief available to recovery of costs and attorneys' fees incurred by the debtors in enforcing the

bankruptcy court's automatic stay and discharge injunction. Pet. App. 15-16. It is simply extravagant to suggest that the Eleventh Circuit's holding substantially broadens States' exposure to affirmative relief by debtors, assuming that such would be undesirable.

2. Respondents candidly acknowledge that there is discordant circuit authority concerning the modalities of waiver of States' Eleventh Amendment immunity in bankruptcy proceedings. But the conflict is not along the fault-lines that Petitioner has identified. Nor is the trend in the direction of cataclysmic tremors that Georgia prophesies. Rather, there has been a progressive reconciliation of circuit authority around the principle that States narrowly waive their Eleventh Amendment immunity in proceedings which arise out of the same transaction or occurrence as the proof of claim that a State agency files against a bankruptcy estate. Ambiguities do remain, though, and Respondents frankly recognize that because of the relatively simple posture of this case, it may be viewed as an ideal candidate for review.[1] Respondents submit, however, that in all respects, the decision below is correct.

a. The first subject of confusion is the source of relevant law for States' Eleventh Amendment immunity in bankruptcy. Respondents do question Georgia's assertion that there is a genuine split in circuit authority on the constitutionality of 11 U.S.C. § 106(b). That provision

[1] Respondents note that this Court denied certiorari in *Wyoming Dep't of Transportation v. Straight*, 119 S.Ct. 446 (1998) (No. 98-418) (seeking review of 143 F.3d 1387 (10th Cir. 1998)), raising similar (if not identical) issues of waiver of Eleventh Amendment immunity in bankruptcy. Consideration is pending in *Texas v. Walker*, No. 98-348 (U.S. filed Aug. 26, 1998) (seeking review of 142 F.3d 813 (5th Cir. 1998)). The *Walker* case raises the question of Eleventh Amendment immunity in bankruptcy proceedings in which a State has *not* filed a proof of claim, and thus its disposition would not necessarily be controlling here.

simply articulates a standard of waiver of State Eleventh Amendment immunity from compulsory counterclaims arising from the same transaction or occurrence as the proof of claim that a State filed against a bankruptcy estate. Respondents grant that although one Circuit (the Tenth, in *Wyoming Dep't of Transp. v. Straight*, 143 F.3d 1387 (10th Cir. 1998)) did uphold the constitutionality of that provision, it is by no means clear that any court of appeals has expressly held § 106(b) as violative of the Eleventh Amendment.[2]

Indeed, section 106(b) has been consistently understood by the courts of appeals following *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), as merely a codification of this Court's common law understanding that a State waives its sovereign immunity in federal bankruptcy proceedings when it appears to press a claim. This was precisely the position taken in the opinion below. See Pet. App. 9-10 n.8. See also *In re Platter*, 140 F.3d 676, 679-80 (7th Cir. 1998); *Texas v. Walker*, 142 F.3d 813, 823 (5th Cir. 1998), cert. applied for No. 98-348 (U.S. filed Aug. 26, 1998); *AER-Aerotron v. Texas Dep't of Transp.*, 104 F.3d 677, 681, 683 (4th Cir. 1997). Respondents maintain that whether § 106(b) is viewed as an independent test for waiver of States' Eleventh Amendment immunity or as a codification of pre-existing common law on the subject, it is constitutional.

b. The second source of difficulty is the actual

[2] *In re Creative Goldsmiths*, 119 F.3d 1140 (4th Cir. 1997), is doubtful as an unqualified rejection of the constitutionality of section 106(b). In that case, the statutory predicates for the assertion of waiver under that provision had not been satisfied. See id. at 1149 ("The trustee's action in this case . . . does not arise out of the same transaction or occurrence supporting Maryland's proof of claim for unrelated taxes."). The Fourth Circuit also acknowledged that, notwithstanding its dicta on the constitutionality of § 106(b), that provision "may correctly describe those actions that, as a matter of constitutional law, constitute a waiver of the Eleventh Amendment." See id. at 1147.

consistency of section 106(b)'s elements for waiver with pre-existing case law. Respondents disagree with Georgia's suggestion that these cases -- including the decision from which review is sought here -- are an untoward expansion of this Court's long-standing articulation of the scope of States' waiver in bankruptcy. In *Gardner v. New Jersey*, 329 U.S. 565 (1947), this Court noted that

> It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. . . . When the State becomes the actor and files a claim against the fund, it waives any immunity it might otherwise have had respecting the adjudication of the claim.

Id. at 573-74. This confirmed this Court's earlier observation that "[i]f a state desires to participate in the assets of a bankrupt, she must submit to the appropriate requirements of the controlling authority. . . ." *New York v. Irving Trust Co.*, 288 U.S. 329, 333 (1933); see also *Clark v. Barnard*, 108 U.S. 436, 448 (1883).

Georgia's interpretation is that *Gardner* allows a State to waive its immunity only as to the disposition of the claim it files, but not as to any proceeding to enforce the bankruptcy's court's order in respect to the disposition of the claim.[3] This limiting construction is unsupported by the

[3] In this respect, at least one of the pre-*Seminole Tribe* cases Petitioner relies upon may, in fact, support Respondents' position. In *State of Ohio v. Madeline Marie Nursing Homes*, 694 F.2d 449 (6th Cir. 1982), the Sixth Circuit held that the act of filing a proof of claim did not waive Ohio's Eleventh Amendment immunity for matters unrelated to the claim. See id. at 462. As the court below noted, Pet. App. 14, and as Respondents suggest here, an action to enforce the bankruptcy court's discharge injunction and automatic stay (continued...)

language of *Gardner*. More importantly, to the extent that section 106(b) may actually codify a higher threshold than *Gardner* -- by requiring (1) that a State file an actual proof of claim, (2) that the counterclaim made by the debtor be the "property of the [bankruptcy] estate," and (3) that it arise from the "same transaction or occurrence" as the State's claim -- any criticism of section 106(b) is quite unwarranted.[4]

The court below was careful to indicate that the type of proceeding to which a State's waiver was deemed to attach -- enforcement of automatic stay or discharge injunction orders in proceedings in which a State participated by filing a proof of claim -- was fully consistent with *Gardner*. *Gardner* held that the State's waiver applied to all matters "respecting the adjudication of the claim" made by the State. 329 U.S. at 574.

c. The third, and final, matter of concern is the extent of State waivers of immunity. Petitioner is right to note that various courts of appeals have, depending on the nature of cases before them, articulated rules that have had the effect of extending waivers in various directions.[5] But,

[3](...continued)
orders as against a State that participated in the adjudication of the claim (by filing a proof of claim) is certainly "related" to the claim disposition process.

[4] To the extent that Petitioner appears to be relying, see Pet. 15-17, on the principle that waivers of Eleventh Amendment immunity be unequivocally expressed, Respondents would note that this Court has never suggested that a State's actual litigation conduct can never be held as an affirmative waiver of sovereign immunity. Cf. *Wisconsin Dep't of Corrections v. Schacht*, 118 S.Ct. 2047, 2055-57 (1998) (Kennedy, J., concurring).

[5] The Seventh Circuit appears, despite the language and thrust of *Gardner*, to extend the waiver made in filing the proof of claim "only so far as necessary to adjudicate that claim." *Moragne v. Illinois Dep't of Public Aid*, 710 F.2d 1297, 1301 (7th Cir. 1983). But
(continued...)

ironically enough, the decision below presents one of the rarest, and least controversial, occasion for waivers: when a State defies the bankruptcy court's orders for automatic stays and discharge injunctions, and the debtor is compelled to initiate proceedings to make the State comply. In such circumstances, as the Eleventh Circuit held, Pet. App. 15-16, the debtor is at least entitled to recovery of the costs and attorneys' fees associated with the enforcement of the bankruptcy court's orders.

3. Respondents trust that these intimations will inform the Court's decision as to whether this matter is worthy of plenary review. If this Court is otherwise disposed to grant the Petition, there is a threshold issue that may require the Court's attention. Respondents raised below an argument that Congress had validly *abrogated* Georgia's Eleventh Amendment immunity when it legislated 11 U.S.C. § 106(a).[6] Respondents argued below that this abrogation of Eleventh Amendment immunity was unequivocally expressed by Congress, and, to the extent that it concerned enforcement of the automatic stay and discharge injunction provisions of the Bankruptcy Code, 11 U.S.C. §§ 362 & 524, was enacted pursuant to the Due Process and Privileges or Immunities Clauses of the Fourteenth Amendment.

This argument was accepted by both the Bankruptcy

[5](...continued)
this opinion may well have been overruled sub-silentio by *In re Platter*, 140 F.3d 676, 679-80 (7th Cir. 1998). The Fourth Circuit, in *In re Creative Goldsmiths*, adhered to a compulsory counterclaim (or "same transaction or occurrence") standard, 119 F.3d at 1149, as did the Tenth Circuit in *In re Straight*, 143 F.3d at 1391-92.

[6] 11 U.S.C. § 106(a) (1997) provides in pertinent part that "Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit . . . with respect to the following: (1) Sections . . . 362 . . . [and] 524 . . . of this title." Id.

Court, Pet. App. 32-36, 41-47, and by the District Court. Pet. App. 21-24. It was renewed before the Eleventh Circuit, see Pet. App. 8-9, but that court chose not to address it.

Whether § 106(a) was a valid abrogation of States' Eleventh Amendment immunity under the Fourteenth Amendment has been considered by a number of courts of appeals. All courts which have considered the issue have agreed that Congress unambiguously expressed an intention in 11 U.S.C. § 106(a) to abrogate the States' Eleventh Amendment immunity in a large number of bankruptcy proceedings. Yet, most of these same courts, relying on language in this Court's *Seminole Tribe* decision, 116 S.Ct. 1114, 1131-32 n.16, and the reasoning of *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), have held that § 106(a) could only have been legislated pursuant to the Bankruptcy Clause of Article I and otherwise exhibits no Fourteenth Amendment concerns. See *In re Creative Goldsmiths*, 119 F.3d at 1144-47; *In re Fernandez*, 130 F.3d 1138, 1139 (5th Cir. 1997); *In re Sacred Heart Hosp. of Norristown*, 133 F.3d 237, 243-45 (3d Cir. 1998); *In re Elias*, 218 B.R. 80, 84-86 (B.A.P. 9th Cir. 1998); *In re Lapin*, 226 B.R. 637, 644 (B.A.P. 9th Cir. 1998). Section 106(a) of the Bankruptcy Code has thus been struck-down as unconstitutional, with relatively little consideration by the lower courts.

To the extent this case is otherwise suitable for review, Respondents concur with Petitioner (see Pet. 2) that the constitutionality of 11 U.S.C. § 106(a) is properly drawn into question and may be ripe for consideration by this Court. The lower courts have simply misapprehended language in the *Seminole Tribe* and *City of Boerne* opinions by categorically ruling that federally-created due process and property rights arising in bankruptcy are not a legitimate

Fourteenth Amendment ground justifying Congress to abrogate the States' Eleventh Amendment immunity in federal bankruptcy proceedings.[7] Respondents would be prepared to argue that this Court should recognize that certain bankruptcy proceedings -- including the automatic stay of section 362 and the discharge injunction of § 524 -- are so central to the operation of the (constitutionally-mandated) uniform, federal bankruptcy system as to rise to the level of due process or privileges or immunities that Congress is entitled to protect by abrogating States' Eleventh Amendment immunity pursuant to the Fourteenth Amendment.

In any event, Respondents are clearly entitled to raise the abrogation argument as another ground for affirmance, and wish to reserve their right to do so. Nevertheless, the Court may desire to instruct the parties as to briefing on this subject, and thus to revise the Questions Presented offered by Georgia.

[7] Respondents note that the precise extent of *Seminole Tribe*'s application to federally-created property rights in patents is at issue before this Court in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S.Ct. 512 (1999) (No. 98-531) (granting review of 148 F.3d 1343 (Fed. Cir. 1998)).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

DAVID J. BEDERMAN
Counsel of Record
Gambrell Hall
Atlanta, Georgia 30322-2770
Phone (404) 727-6822
Counsel for All Respondents

SCOTT J. KLOSINSKI, P.C.
6 George C. Wilson Court
Augusta, Georgia 30909
Counsel for Headricks

ANGELA CARTER MCELROY
McElroy & Toole
410 Telfair Street
Augusta, Georgia 30901
Counsel for Burkes

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